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APPEAL OF M & P EQUIPMENT CO.

IBCA-1088-11-75

Decided *September 28, 1979*

Contract No. 14-06-500-2152 (Specifications No. 500C-329), Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Duty to Inquire—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

Where a clearing contractor claims entitlement to an equitable adjustment base on the standard Differing Site Conditions Clause of the contract, and the evidence shows that the principal causes of any increased costs which may have been incurred were heavy rains and failure of the contractor to make a reasonable prebid investigation of the site or examination of specifications, and no evidence of fault on the part of the Government is presented, the Board holds that the contractor has not sustained its burden of proof for entitlement to an equitable adjustment, and the appeal will be denied.

APPEARANCES: Mr. Herby Branscum, Jr., Attorney at Law, Perryville, Arkansas, for appellant; Mr. Z. P. Sheldon, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This is an appeal from the Contracting Officer's denial of a claim by the contractor/appellant, M & P Equipment Co. (M & P; sometimes, appellant), for additional compensation in the amount of $46,630. The claim arises out of a contract with the Bureau of Reclamation awarded to M & P for clearing Mountain Park Reservoir, Mountain Park Project, Oklahoma. The contract was completed and accepted Jan. 30, 1975, well within the completion time prescribed by the contract.[1] The full contract price of $117,000 was paid to M & P. However, M & P excepted the claim of $46,630 from the release it executed in connection with final payment.

According to its complaint, M & P based its claim on Clause No. 4 of the General Provisions of the above-numbered contract;[2] alleging that

[1] The contractor was to begin work within 15 days after date of receipt of the notice to proceed. The notice to proceed was dated Jan. 31, 1974. The completion time allowed for all clearing of Phase 1, below elevation 1,390, was 180 days; and for Phase 2, above elevation 1,390, was 360 days (AF-4 & 5).

[2] Clause 4 provides:

"4. Differing Site Conditions

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a

the damages claimed resulted from occurrences caused by persons other than claimant "which this claimant had no control over and which could not have been prevented by this claimant;" and alleging further that, as a result of the negligence of supervision and control over the operations of the project and inadequately formulated plans for the project, the claimant suffered the following damages by having to provide extra equipment and labor expense:

1 108B Linkbelt Crane ---------2 months--	$ 8, 000. 00
1 D8 Caterpiller Dozer ----------1 month--	5, 000. 00
2 D-7 Caterpiller Dozers ---------1 month--	8, 000. 00
2 Log Skidders----1 month--	4, 600. 00
6 Extra Chainsaws @ One-half Price 130.00----------	780. 00
Moving 108B Linkbelt Crane to and from Job----------	2, 220. 00
Labor—Four (4) Weeks Payroll ----------	12, 668. 95
Moving 2 Log Skidders to and from Job----------	2, 438. 00
Taxes & Insurance on Payroll (23.07%)----------	2, 922. 73
Total ----------	$46, 630. 00

Appellant alleged that the specific incidents which caused the damage were as follows:

(a) On or about March 2, 1974, the dirt piled adjacent to the bank (both sides) of West Otter Creek for approximately 1000 feet upstream from the dam washed into the creek causing water to submerge portions of sections 10, 9, 3 and 4. Land in the area that was not flooded was saturated with subsurface water making it impossible to operate heavy equipment, requiring claimant to change its operation to the use of chainsaws, skidders, crane and hand labor. This condition was caused by those constructing the dam and claimant had no supervision, power, authority or control over that operation creating the adverse condition.

(b) On or about April 19, 1974 on Glen Creek at Highway 183 a contractor other than claimant doing work on the project constructed an earthen dam to supply water for his job on the project, the water backed up by the dam caused usually [*sic*] wet conditions, then as claimant below the dam with its clearing the dam cut by another contractor causing flood condition in the area where claimant was working.

(c) On or about April 28, 1974 there were rains in the area that were unusually heavy, and the diversion pipe being used by the contractor constructing the dam was inadequate to divert the water, the pipe was corrugated metal about 7 feet in diameter, and it collapsed causing the area to flood and allowing the ground to become fully saturated with water. This collapse of the diversion pipe and subsequent flooding caused depris [*sic*], logs and trash to be deposited upon areas that had been cleared requiring additional work for claimant to re-clear. The ground saturation from the flooding caused by the collapsed pipe caused claimant to resort to hand labor which was much slower than had been planned by machinery.

That all of the foregoing conditions adversely affecting claimants [*sic*] job were caused by operations other than plaintiff's operation. The Bureau of Reclamation was promptly and fully notified of each condition.

By its answer, the Government admitted, in pertinent part: That

F. N. 2—Continued
result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

"(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

work on the project by M & P started about Feb. 18, 1974; that damages claimed by appellant may have resulted from occurrences caused by persons over whom appellant had no control; and that some of the conditions may have existed as alleged in subparagraph (a) above. However, it denied generally the remaining allegations of the complaint and denied specifically that the appellant has a valid claim against the Government for the damages alleged. The Government asserted that it had made full payment to appellant in accordance with the terms of the contract and requested the Board to find that appellant is not entitled to reimbursement by the Government for the alleged damages and to deny the appeal.

A hearing was held at the request of appellant at Altus, Jackson County, Oklahoma, on Oct. 27, 1978. The transcript thereof was received by the Board on Dec. 20, 1978, and at his request, counsel for appellant was granted an extension until June 27, 1979, within which time to submit his brief. (Order of the Board, dated May 30, 1979.) His brief was filed on June 27, 1979. On July 23, 1979, the Government filed a renewed "Motion to Dismiss," together with its "Posthearing Brief." By letter of Aug. 9, 1979, counsel for appellant indicated that he would not file a reply brief, stating, "I have decided to stand on the brief that I have already filed."

The Motion to Dismiss

Early in this proceeding, the Board denied what it treated as the Government's motion to dismiss, but without prejudice to its right to renew such motion at the time its posthearing brief was filed. Accordingly, the motion to dismiss was renewed. The ground stated therefor was that "[a]ppellant's claim for additional compensation for costs incurred, asserted * * * to be due to the Government's negligence, is a claim for breach of contract which is beyond the jurisdiction of the Board of Contract Appeals to decide."

Since this appeal does not come under the Contract Disputes Act of 1978,[3] we do not have jurisdiction to decide this case on a breach of contract theory. However, we are not convinced that appellant's claim is properly characterized as involving that theory. Giving the appellant the benefit of the doubt, it may have sufficiently alleged a claim based on breach of the Government's duty to cooperate and not to hinder contractor's performance,[4] or on the theory of defective specifications. The motion is therefore denied.

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[3] P.L. 95-563, 92 Stat. 2383, (to be codified in 41 U.S.C. §§ 601-613). The effective date of this Act is Mar. 1, 1979. Sec. 8(d) (41 (U.S.C. § 607(d)) expanded the jurisdiction of agency boards of contract appeals by authorizing them "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

[4] See *Louis M. McMaster, Inc.*, AGBCA No. 76-156 (Feb. 23, 1979), 79-1 BCA par. 13,701; *Laburnum Construction Corp.*, 163 Ct. Cl. 339 (1963); and *United States* v. *Spearin*, 248 U.S. 132 (1918).

Issue Presented on Appeal

According to their briefs, the parties agree that the principal issue before the Board is whether the Government is liable for damages caused to appellant as a result of negligent supervision and control of the worksite.

Contentions of the Parties

Appellant's brief summarizes the facts to be as follows:

> The Department of the Interior contracted with the claimant to clear land for the Mountain Park Reservoir Project. Contractors piled dirt along a creek which subsequently washed into the creek and flooded 4 sections of land claimant was clearing. Another contractor caused flood conditions in claimant's work area when a dam used to supply water was cut. Heavy rains caused a diversion pipe to collapse and flood an area claimant had already cleared thus creating additional work for claimant because of the necessity of re-clearing the land. The claimant was forced to abandon the use of heavy equipment in the clearing of the land and was forced to use hand labor and chainsaws [*sic*].

Appellant's brief then lists the points of law upon which it relies and cites numerous cases to support the points of law. The listing is as follows:

> The government is liable for the damages caused to the claimant as a result of the negligent supervision and control of the worksite. A contractor is entitled to additional compensation or reimbursement for increased costs of performance and expenses caused by act or omissions of the government including negligence on the government's part. A government contract contains an implied warranty that the specifications are adequate if complied with. The government also has a duty not to impede the contractor's performance. This duty applies to other contractors over whom the government has control. The government is also liable for extra and unanticipated hazards even when the contractor assumes the liability for loss.

Although in the "Discussion and Argument" portion, appellant's brief contains correlations of the points of law with the *allegations* of the complaint, there is no attempt to correlate them with any *evidence* of record. There are no transcript citations to the testimony and no references to any of the exhibits or items in the appeal file. What appellant considers to be its *proof* in support of necessary findings of fact to which the cited case law may be applied is not indicated. The final paragraph, entitled "Conclusion," is as follows:

> The respondent [Government] stood by in this case and allowed other contractors on the job to create conditions which required this claimant to expend additional monies to perform his contract. The only party on the entire project having the authority to direct preventive measures was the respondent. Respondent's failure to perform its legal duty in this regard entitles appellant to recover its damages of $46,630.00.

In its brief, the Government analyzes in detail the case law cited by appellant and argues generally that the cases cited either are distinguishable on their facts from the facts of the case at hand, or are not in point.

With respect to the facts, the Government's contentions may be summarized as follows: That the unanticipated conditions causing appellant increased costs resulted from appellant's cursory, prebid investi-

gation of the worksite, its failure to examine the plans and specifications in the contracts of other contractors on the project, and from unusually heavy rains; that there is no evidence showing that the difficulties encountered by appellant were attributable to acts or omissions of employees of the Government; that the dam contractor's plans and specifications were available to appellant and showed that the area where the dirt was piled was designated as a waste area for the dam contractor; that there is no evidence showing that the earthen dam, allegedly breached by another contractor, caused appellant any delay or damage; and that the collapsed diversion pipe, alleged by appellant to have caused flooding upstream from the coffer dam, did not inhibit the flow of water, but, in fact, was flowing at full capacity after the break.

The Government's conclusions contained in its brief include the following:

> Appellant failed to present any evidence in support of its allegation, that the Government was negligent in its supervision and control of the worksite, nor did it present evidence to show project plans were inadequately formulated. * * *
>
> The Government is not liable for damages resulting from Appellant being unable to complete its obligation under the contract in substantially less time than allowed under the contract. * * *
>
> The conditions alleged by Appellant to have been caused by the Government were not "differing site conditions" under article 4 of the contract. * * *
>
> The real impediment to contractor's attempt to finish ahead of schedule was the abnormal amount of rain, which is not a "changed condition" and does not entitle Appellant to additional compensation.

The Evidence

Exhibit 5 of the Appeal File (AF–5) contains the construction contract and the specifications No. 500C–329 pertaining to this proceeding. Clause 13 of the General Provisions of the contract provides:

> **13. Conditions Affecting the Work**
>
> The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

The pertinent sections of the specifications provide as follows:

> 1.4.1. INVESTIGATION OF SITE CONDITIONS
>
> Bidders are urged to visit the site of the work and by their own investigations satisfy themselves as to the existing conditions affecting the work to be done under these specifications. If the bidder chooses not to visit the site or conduct investigations he will nevertheless be charged with knowledge of conditions which reasonable inspection and investigations would have disclosed.
>
> Bidders are also urged to carefully examine all of the materials and information regarding site conditions made available by the Government and to obtain their own samples and perform tests

on the soil and rock materials to determine unit weights, to evaluate shrinkage and swell factors, and to evaluate other properties which the bidder believes to be significant in arriving at a proper bid.

Bidders and the contractor shall assume all responsibility for deductions and conclusions as to the difficulties in performing the work.

1.4.5. INTERFERENCE WITH THE WORK

Under separate contracts, the relocation of U.S. Highway 183, the relocation of the St. Louis and San Francisco Railway, construction of the Mountain Park Dam and dikes, the roosevelt [*sic*] water wells, access road, and pipelines, and other features of the Mountain Park Project will be in progress at the same time as work required by these specifications. The clearing contractor shall schedule and conduct his activities in coordination with other contractors in the area so that interference with other work is minimal.

1.4.11. CREEK DISCHARGE RECORDS AND DIVERSION WORKS INFORMATION

Hydrographs of the West Otter Creek and the creek diversion plan of the contractor for construction of Mountain Park Dam may be examined on drawings filed in the project office. These drawings and data are available for information of bidders and the contractor. The Government does not guarantee the reliability or accuracy of the hydrograph or diversion works information and assumes no responsibility for any deductions, conclusions, or interpretations which may be made from them.

2.1.3. PRIORITIES AND QUANTITIES

a. Priorities.—Clearing below elevation 1390, identified as Phase I clearing in paragraph 1.2.3, shall be completed in the initial months of the contract to assure clearing of the area prior to flooding occasioned by construction of diversion works by the dam contractor. Phase II clearing constitutes all clearing above 1390 contour.

The appellant's witnesses were Mr. Levi Patton and Mr. Jimmy A. Patton. Since retiring, Mr. Levi Patton, who had had around 30 years in the construction business, has been doing some work for his son, Jimmy, President of M & P Equipment Co. (Tr. 17). Levi Patton served as project engineer on the Mountain Park Reservoir clearing job (Tr. 18).

His testimony, with respect to the first incident set forth in the complaint, was substantially as follows:

That Otter Creek and Glen Creek join together about 500 or 600 feet upstream from the dam, and that a canyon exists at the location which is where the work started; that while working with chain saws and a dozer, the clearing crew had trouble with water caused by the dam contractor piling dirt along the creek; that the dirt was sliding into the creek, backing up the water instead of allowing it to run through the coffer dam which caused the unanticipated use of a crane and more chain saws and hand labor (Tr. 26–34).

With respect to the second incident, Mr. Levi Patton's testimony is summarized as follows:

That on or about April 19, 1974, difficulty was experienced because of a little dam that had been built by another contractor across Glen Creek near the bridge on Highway 183, presumably to provide water for trucks; that clearing work had been going on in the area below this dam for about 10 days, when somebody breached the dam causing water to flood the working area; that this prevented the normal functioning of the bulldozers so that a crane was required which was more costly to operate (Tr. 34–43).

His general testimony regarding the third incident was:

That about April 28, 29, 1974, it started raining and rained so hard that he got his crew out of bed at the motel where they were staying at about 1:00 a.m.; that to prevent the equipment from being ruined, they went to the working area and moved the equipment to higher ground; that "the coffer dam just folded up," and "it just flooded the whole country"; that the timber which had been piled in decks was knocked off the banks and carried back over the territory already cleared; that then "we had to go in there and clean all that up"; and that then "all we did was work in mud and water" (Tr. 43, 44).

His verbatim testimony (Tr. 44, 45) was as follows:

Q (By Mr. Branscum) Wait just a minute now. What caused the flooding? You say that there was a diversion pipe in the Coffer Dam; is that correct?

A It was on account of this heavy rain up above coming down and all, the creek.

Q Did anything happen at the Coffer Dam that caused the flooding to increase?

A Yes, it couldn't take the water, you know. It folded up there.

Q What folded up?

A The pipe that drained all the water.

Q Okay.

THE COURT: When you say "folded up," do you mean it was blocked? It was bent?

THE WITNESS: Yes, sir.

THE COURT: Or what?

THE WITNESS: Yes, sir, just knocked it out to the side.

THE COURT: Was this made of some kind of metal, this pipe?

THE WITNESS: Yes, sir, sheet metal.

THE COURT: And you say it folded, and that blocked the water from going through?

THE WITNESS: Yes, sir.

THE COURT: I see.

Later on, at page 47, the transcript contains the following testimony:

THE COURT: What was the diameter, if you know, of that pipe roughly?

THE WITNESS: Your Honor, I never did, you know, measure the pipe. Of course that was out of my contract, you know.

THE COURT: Did you see it?

THE WITNESS: Yes, sir.

THE COURT: What would you estimate the diameter?

THE WITNESS: I was estimating it to be around 7 foot diameter.

* * * * *

Q (By Mr. Branscum) Now, you say that the rain and flood, the heavy rain buckled the pipe, and it just collapsed; is that correct?

A That's correct.

Under cross-examination, Mr. Levi Patton testified substantially as follows:

That under the terms of the contract, he had complete discretion as to type of equipment and number of men he used; that he and his son, Jimmy, looked over the site prior to the contract award and that while looking over the creek, he said, "Well Jimmy, you know, dry like it is, why we can work most of it with dozers and cutter dozers and rakes, and that is what we figured on"; that he was advised that he should coordinate his work with the other contractors in the area; that he did not know who breached the dam on Glen Creek; that according to the contract the Government could not have forced him to complete the job ahead of the designated time; and that in clarification of his testimony on direct examination, he had intended to use a crane from the beginning, but that the flooding required getting a larger crane, the link belt crane (Tr. 53–58).

Mr. Jimmy Patton's testimony on direct examination (Tr. 61–90) may be summarized as follows:

That in the fall of 1973, he looked over the job site, just the clearing areas, with a Mr. Albright, an explosives man for

another contractor, did very little walking, but drove the farm roads; that he observed that the land "was as dry as a bone—to me, it looked like it was a drought out here"; that Glen Creek and Otter Creek had very little water, just a trickle in them, just a pot hole here and there; that that was the only site visit he made before the bid; that the job was bid in two phases; that phase 1 was below 1,390 feet elevation, bid at $37,000, and phase 2 was above 1,390 feet elevation, bid at $80,000; that after being notified of the award, he made a second visit to the job site and noticed a diversion system and coffer dam being built with a 7-foot corrugated steel pipe that ran through the dam; that he commented to his dad that it was awful small and he was afraid it was going to give them a lot of problems; that he called this to the attention of the Bureau by his letter of December 31, 1973 (Exh. D, AF–1); that he visited the job two or three times after it commenced; that he observed the dirt dumping and sliding incident right after the wet condition occurred in early March, and noticed the blockage and pooling which caused saturation from a subsurface standpoint; that he then arranged for the large, link belt, 108 crane to replace the small crane he was planning to use; that he recalled the breached dam incident on Glen Creek and that after that, they used one crane and two log skidders in place of the bulldozers; that he did not visit the job immediately, but sometime after the large flood; that it had rained about 7 inches in 1 or 2 days; that the diversion system and coffer dam "wasn't big enough to carry the flow of water," which is what he was alluding to in his letter of December 31; that he had figured probably they would need a 12- or 15-foot diameter pipe; and that if there had been a 25-foot diversion pipe in this coffer dam "I don't think it would have took it."

The cross-examination of Mr. Jimmy Patton (Tr. 112–119) produced the following testimony:

That he did read the contract and the specifications prior to submitting his bid and remembers the provision concerning the investigation of the site advising bidders to visit the site and determine what the conditions were; that during his investigation of the site, "I didn't check the dam out at the time, but I looked the clearing area over—that was the only part I was concerned about"; that *he did not examine the dam constructor's plans for diversion prior to submitting his bid and remembers that in the specifications he was advised that they were available in the project office;* that he did not see the diversion pipe after it broke, but assumed it collapsed or buckled and twisted; and that it did not function—the water was not going out of it—he knew this—he did not personally see it himself, but his father did.

The Government's two witnesses were Phillip B. Lankford and Dewey W. Geary, Jr. Mr. Lankford had been employed by the Bureau of Reclamation (Bureau) for 35 years at the time of the hearing. At that time, he was Chief of the Field Engineering Division, but Chief Inspector for the Bureau during the M & P clearing job. Mr. Geary had been employed 17 years by the Bureau and was Project Construction Engineer for the Mountain Park Project during the performance of the clearing contract. He is a registered Civil Engineer with a B.S. degree in Civil Engineering from the University of Iowa.

The direct testimony of Mr. Lankford (Tr. 122–128) may be summarized as follows:

That in the performance of his duties as inspector, he visited the project about every 2 days; that he visited the dam site after the diversion pipe broke on April 30, 1974, at which time he took a photograph (Government Exhibit D) which is a pic-

ture of the downstream side of the upstream diversion or coffer dam; that *the picture was taken after the pipe broke and shows that the water was running through the pipe at full flow;* that prior to flood, the pipe had been supported by wooden towers between the upstream and downstream coffer dams; and that the towers collapsed and the pipe broke, but the water continued to flow through it and no additional ponding upstream from the upper diversion dam, where M & P was working, was created by the collapse.

His cross-examination (Tr. 128–157) brought forth the following testimony:

That the collapse took place at about 4:00 a.m. during the morning of April 30, 1974; that the diversion pipe was 72 inches in diameter; that the distance between the two coffer dams was about 200 feet, less than a block; that the pipe permitted the water to flow just as well after the collapse as before; that the dam contractor designed the diversion pipe and the Government had recommended that its size be a minimum of 6 feet; that the area immediately above the upper coffer dam had once been inundated by the old Snyder Dam, built in the 1930's which had a top elevation of 1,370.1 feet, and was breached in 1972 so that the area where M & P was working "never did dry up" and contained only small growth, just weeds and real fine brush, because it had been standing in water since the 1930's; that he inspected that area in response to M & P's complaint regarding the dirt piling incident along Otter Creek, and that the backup of the water was in the confines of the creek banks extending up to where the creeks ran together; that although some of the backup was probably caused by the dirt piles sliding off, he could not tell that it was hampering the operations of M & P; that, except for correspondence between M & P and the Bureau, he was not aware of the cutting of the small dam near Highway 183, and in the course of his regular inspections did not observe any water in the working area.

The significant portions of Mr. Geary's testimony adduced by direct examination (Tr. 157–180) were:

That the reason for dividing the M & P clearing job into two phases was to minimize conflicts between the clearing of the reservoir and the construction of Mountain Park Dam; that the work under the clearing contract was completed within the specified times for both phases; that it was anticipated by the Bureau that other contractors would be working in the area during the clearing contract and the prospective bidders were made aware of that fact by the specifications; that the dirt piling along Otter Creek was part of the diversion system plan under the contract with the Mountain Park Dam contractor and the upstream portion along the banks was designated as a waste area for the dam contractor; that, with respect to the Glen Creek incident, he had given permission to the highway relocation contractor, Cornell Construction, to build a small earthen dike in Glen Creek in 1972 or 1973 for construction purposes; that it was 8 feet high and about 30 feet across within the creek channel; that about a month later, some heavy rains washed out the dam down to a couple of feet, down to the channel, and the contractor made no attempt to rebuild it; that this dam had washed out more than a year before the bids were made for the clearing project; that he was not aware of the breach of the small dam that remained of which M & P complained, or who may have breached it; that the specifications for the construction of Mountain Park Dam required the dam contractor to submit a plan for the diversion of West Otter Creek; that the plan as finally approved was made available to the bidders on the clearing project; that the collapse of the diversion pipe did not interfere with appellant's clearing operation; that the dam contractor suffered the real loss as

a result of the breaking; that the pipe was constructed in 20-foot sections and did not actually break, but rather came apart at the joints held together by 1-foot bands; that there was no blockage in the pipe that went through the coffer dam; that the breaking of the pipe had nothing to do with the upstream reservoir; that the system continued to function as it was designed; and that the Government did not intentionally, or otherwise, interfere with appellant's clearing operation.

The testimony, in general, developed by the cross-examination of Mr. Geary (Tr. 180–202) was:

That the big flood resulted from a heavy, heavy rain—about 7 inches in 2 days; that although all that much rain is abnormal, it is not really unusual for that area to be dry for a year then get tremendous rain at one period; that the diversion pipe in the coffer dam was not too small—it was only supposed to carry the normal flow and not the flood water; that had the pipe been 12 or 15 feet in diameter, there would have been less flooding above the coffer dam; that had M & P looked at the plans and specifications for the approved diversion plan, they certainly would have known that the area stood the chance of being inundated during heavy rains; that he did not see the sliding of the dirt which had been piled up along the creek as a problem since the area was not flooded and the water was down in the channel itself; that the dam contractor was required to keep the elevation above the coffer dam at the 1,365-foot elevation only during normal flows; that during a flood situation, he had no control over it, and the rainfall and time factors determined the receding; and that the dam contractor had the choice of taking the 6-foot pipe and a higher coffer dam or a larger pipe and lower coffer dam.

The substance of his redirect examination testimony (Tr. 202–204) was:

That the problems the clearing contractor had with the high water were problems which were to be anticipated from the specifications; that the Bureau anticipated the possibility of flooding by the language in section 2.1.3 of the specifications; that the flooding was not caused by the breaking of the pipe, but was a condition caused by the heavy rains.

Analysis and Findings

Both witnesses for the appellant admitted their failure to examine the diversion system plans showing the 6-foot diversion pipe as well as the designated waste area for piling dirt along the creek bank. The photograph taken of the 6-foot pipe on Apr. 30, 1974, as well as the testimony of the two Government witnesses conclusively indicate that Mr. Levi Patton was apparently mistaken in his conclusion that the pipe was bent and buckled and blocked the water from flowing through the pipe. There was no persuasive evidence presented that suggested negligent supervision or control over the project by the Government project engineers or any other Government personnel. The evidence is undisputed that the major cause of the big flood was the heavy rains which occurred on or about Apr. 29 and 30, 1974. It was also undisputed that the contractor here was not delayed in the completion of the contract since the work was completed and accepted well within the specified completion dates.

Consequently, based upon the clear preponderance of the evidence, as indicated above and shown by

our review of the entire record, we make the following findings of fact:

1. That a reasonable prebid site investigation and examination of the specifications for the clearing contract and of the diversion system plans and specifications for the dam construction contract on the part of the appellant would have disclosed the hazards and danger of the flooding which was later encountered;

2. That even though invited, along with other bidders, to do so, appellant's personnel failed to examine the diversion system plans approved for the dam construction and gave only cursory attention to specifications for the clearing contract:

3. That the work of appellant in the performance of its clearing contract was not interfered with or impeded by any negligent act or omission on the part of any Bureau employee or other personnel of the Government;

4. That the diversion pipe running through the upper coffer dam was not blocked upon the collapse of the wooden-tower supporting structure, but continued to function as it was designed to function by allowing the water to flow through it to full capacity after the collapse;

5. That any increased costs, which may have been sustained by the appellant, resulted from the heavy rains and from appellant's own failure to anticipate that the area in which it would be working might be susceptible to flooding; and

6. That appellant's claimed damages were neither the result of negligent supervision and control over the operations of the project nor of inadequately formulated plans or defective specifications as alleged or inferred by the complaint.

In *Charles T. Parker Construction Co.*, IBCA–355 (Jan. 29, 1964), 71 I.D. 6, at p. 10, 1964 BCA par. 4017, at pages 19,792, and 19,793, this Board stated:

> It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such a loss to the Government, the contractor is obligated to repair the damage at its own expenses. [5]

In *Concrete Construction Corp.*, IBCA–432–3–64 (Nov. 10, 1964), 71 I.D. 420, 65–1 BCA par. 4,520, this Board denied an appeal of a road construction contractor who had claimed relief under the changed conditions clause of the standard construction contract. In the course of that opinion, we said:

> Neither the expression "subsurface or latent physical conditions at the site" * * * are apt methods of describing weather phenomena, such as heavy rain, high winds, or low atmospheric temperature. This has been recognized in the decided cases, which have consistently held that neither of the two categories of changed conditions comprehends storms,

[5] See also *Montgomery-Macri Co. & Western Line Construction Co., Inc.*, IBCA–59 and IBCA–72 (June 28, 1963), 70 I.D. 242 at 279 and 339, 1963 BCA par. 3,819 at pages 19,025 and 19,056, and the cases cited in footnote 40 thereof.

floods, or other forms of abnormal weather.

* * * * *

There is no showing that appellant before bidding sought information as to the time of year when the test holes were driven, or that such information, if sought, would have been refused. In these circumstances the risk that the test holes might have been driven during a normally drier period of the year than the period consumed in contract performance was a risk that appellant assumed under Clause 13 of the contract, as quoted above.

We said, in *Humphrey Contracting Corp.*, IBCA-555-4-66 and IBCA-579-7-66 (Jan. 24, 1978), 75 I.D. 22, 68-1 BCA par. 6820, which also involved performance of a clearing contract: "It is well settled that a changed condition of the second category does not exist if a reasonable pre-bid investigation would have disclosed the existence of the condition which is the subject of the claim."

Decision

In this case, appellant has claimed increased costs resulting from a "differing site" or "changed" condition pursuant to the provisions of paragraph 4(a), General Provisions of the contract. That paragraph places the compensable differing conditions into two categories. Category (1) pertains to subsurface or latent physical conditions at the site differing materially from those indicated in the contract. Category (2) deals with unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Based upon the foreging analysis of the evidence, findings of fact, and cited case authority, we conclude that appellant has failed to show a changed condition under either category. We hold, therefore, that appellant has not sustained its burden of proof establishing entitlement to an equitable adjustment.

Accordingly, the appeal is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

R. GAIL TIBBETTS ET AL

43 IBLA 210

Decided *October 5, 1979*

Appeal from three decisions of the Utah State Office, Bureau of Land Management, declaring various lode mining claims null and void ab initio. AD 49-78, 50-78, and 51-78.

Affirmed in part, set aside and hearing ordered in part.

1. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location — Mining Claims: Relocation—Mining Claims: Withdrawn Land

For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location,

while a relocation is one which is adverse to the prior location.

2. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Recordation—Mining Claims: Relocation—Mining Claims: Withdrawn Land—National Park Service: Generally

Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts.

4. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

Except for claims held under 30 U.S.C. § 38 (1976), a failure to record a mining claim as required by state law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim.

5. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

An oral transfer of a mining claim, though contrary to the statute of frauds, will not serve to invalidate the claim, and a person subsequently seeking to record the claim will be afforded the opportunity to prove that the transfer actually occurred.

6. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Location—Mining Claims: Relocation—Mining Claims: Withdrawn Land

Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment.

APPEARANCES: R. Gail Tibbetts and Ray Tibbetts, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

R. Gail Tibbetts appeals from three decisions of the Utah State Office, Bureau of Land Management (BLM), each dated Aug. 28, 1978,

declaring various lode mining claims null and void ab initio.[1] Ray Tibbetts appeals from one of these decisions, AD-51-78. The State Office decisions recited that the various groups of claims had been located on Mar. 3, 1974, May 20, 1974, and Feb. 1, 1975. The decisions noted, however, that the claims were located upon land which had been included in the Glen Canyon National Recreation Area by the Act of Oct. 27, 1972, P.L. 92-593, 86 Stat. 1311, and had been placed under the administration of the National Park Service. The decisions also noted that the Act had withdrawn the land from location, entry, and patent under the mining laws.

The State Office held that since the claims were located after the passage of the Act withdrawing the land, the claims were null and void ab initio. The decisions recognized appellants' assertion that the locations were meant to be amended locations of earlier claims, but pointed out that nothing on the various location notices indicated that they were amendatory to prior locations.

[1] While a number of departmental, federal, and state court decisions have attempted to draw a distinction between relocation of a former claim and an amended location of such a claim, it is clear that nothing approaching uniformity has resulted. This confusion is understandable since it finds its germination in the 1872 Mining Act, itself. Sec. 5 of the Mining Act, *as amended*, 30 U.S.C. § 28 (1976) contains the only reference to relocation:

> On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. * * * [A]nd upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to *relocation* in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. [Italics added.]

There was *no* reference in the original mining law of the United States to an "amended" location. The term "amended notice of location" was used in sec. 1 of the Act of Aug. 12, 1953, 30 U.S.C. § 501(a) (1976) and in sec. 1 of the Act of Aug. 13, 1954, 30 U.S.C. § 521(a) (1976) relating to mining claims originally located on lands which were embraced by either a mineral lease or a mineral lease application. The term, however, was not defined. It is in no small part due to this omission that the subsequent history of mining law adjudication has been mired in a seemingly endless sea of contradictory statements.

The difficulty arose virtually immediately as a number of states passed laws which permitted amended and additional certificates of location. *See Tonopah & Salt Lake Mining Co.* v. *Tonopah Mining Co.*, 125 F. 389 (C.C.D. Nev. 1903). This was necessitated by the fact that it was not unusual for the original notice of location to contain various minor defects, particu-

[1] The specific claims involved are set out subsequently in the text of this opinion.

larly as regards the actual physical location of the claim. Thus as early as 1885 the Federal courts recognized the right of the mineral locator to amend his location. *See McEvoy* v. *Hyman*, 25 F. 596 (C.C.D. Colo. 1885). It is interesting to note that at this early date, the court recognized, in interpreting the Colorado statute authorizing amended locations, that "[i]t is perhaps unfortunate that the question of amending a certificate and of changing the boundaries of claim, which amounts to a relocation, should be expressed in general terms relating to both subjects, and in one section of the law." *Id.* at 599–600. The court continued noting that the right of correction of the certificate of location had been recognized independently of statutes expressly authorizing amendments to certificates. *See also Fred B. Ortman*, 52 L.D. 467, 471 (1928). Moreover, the court opined that the proviso of the statute limiting its relation back to those situations in which no intervening rights had been initiated referred to the situation where the boundaries of the claim were changed, *i.e.*, a relocation, and not to the amendment of a certificate of location. *Accord*, *Hagerman* v. *Thompson*, 68 Wyo. 515, 235 P.2d 750, 756 (1951); *Nichols* v. *Ora Tahoma Mining Co.*, 62 Nev. 343, 151 P.2d 615, 625 (1944). *See also Brattain Contractors, Inc.*, 37 IBLA 233 (1978).

Similarly, in a case styled *John C. Teller*, 26 L.D. 484 (1898), the Department held that an amended location, permitted by Colorado State law was "made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while [a relocation] is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure." *Id.* at 486.

A relocation is, by the terms of the statute, adverse to the original location, being permissible only where there has been a failure by the original locator to perform assessment work. *See Burke* v. *Southern Pacific R.R. Co.*, 234 U.S. 669, 693 (1914); *Belk* v. *Meagher*, 104 U.S. (14 Otto) 279, 284 (1881); *State of South Dakota* v. *Madill*, 53 I.D. 195, 200 (1930). Thus, unlike an amended location for which credit may be obtained for expenditures made on behalf of the original location (*see Tam* v. *Story*, 21 L.D. 440, 443–44 (1895)), moneys spent in the development of an original claim may not be applied to a relocated claim to fulfill the statutory requirement that $500 be expended on development prior to the issuance of patent. *See Tough Nut No. 2 and Other Lode Mining Claims*, 36 L.D. 9 (1907); *Yankee Lode Claim*, 30 L.D. 289 (1900). A critical question, and one crucial to this case, is whether and in what circumstances an amended location relates back to the date of the original location.

For the purposes of this decision, we will define an "amended" location as a location which is made in

furtherance of an earlier valid location and which may or may not take in different or additional ground. The term "relocation" will be limited to those situations in which the subsequent location is adverse to the original location.[2]

[2] It will be seen that generally an amended location relates back, *where no adverse rights have intervened*, to the date of the original location. *See* Morrison, *Mining Rights*, 16th ed. (1936), at 159–163. Thus, in *Bunker Hill & Sullivan Mining & Concentrating Co.* v. *Empire State-Idaho Mining & Development Co.*, 134 F. 268 (1903), the Circuit Court for the District of Idaho noted: "It has long been held that a mining location may be amended without the forfeiture of any rights acquired by the original location, *except such as are inconsistent with the amendment, but new rights cannot be added which are inconsistent with those acquired by other locations made between the dates of the original and the amended location.*" *Id.* at 270. Additionally, there are certain circumstances in which an amended location notice will relate back to the date of the original notice even in the face of intervening adverse claims. Thus, it has been held that if the amended notice is made to cure obvious defects in the original notice without including any new grounds, it will relate back to the original notwithstanding intervening locations. *McEvoy* v. *Hyman*, *supra*; *Gobert* v. *Butterfield*, 23 Cal. App. 1, 136 P. 516 (1913); *Bergquist* v. *West Virginia-Wyoming Copper Co.*, 18 Wyo. 270, 106 P. 673, 677–78 (1910).

While the *Bunker Hill* case notes that the amended location relates back to the extent it is not inconsistent with the intervening *rights* of others, it must be remembered that if the original claim was valid and was maintained in conformance with the law, the land embraced by the claim would not be open to the initiation of adverse *rights* (*Farrell* v. *Lockhart*, 210 U.S. 142 (1908)), and thus an amendment would of necessity relate back, provided no new land was included in the amendment. *See generally Waskey* v. *Hammer*, 223 U.S. 85 (1912); *Atherley* v. *Bullion Monarch Uranium Co.*, 8 Utah 2d 362, 335 P.2d 71 (1959). No amended location is possible, however, if the original location was void. *See Brown* v. *Gurney*, 201 U.S. 184, 191 (1906). A void claim would be one in which a locator has failed to comply with a material statutory requirement. *Flynn* v. *Vevelstad*, 119 F. Supp. 93 (D. Alaska 1954), *aff'd*, 230 F.2d 695 (9th Cir. 1956).

There is no doubt that withdrawal of land from mineral entry constitutes such an appropriation of the land as to prevent the initiation of new rights. *See Mark W. Boone*, 33 IBLA 32 (1977); *Lyman B. Crunk*, 68 I.D. 190, 194 (1961); *James M. Wells*, A–28549 (Feb. 10, 1961); *United States Phosphate Co.*, 43 L.D. 232 (1914). But to the extent

[2] No attempt will be made to reconcile the terminology used herein with all prior Departmental decisions for the simple reason that they are virtually irreconcilable. *See generally* G. Reeves, *Amendment* v. *Relocation*, 14 Rocky Mt. Min. Law Inst. 207 (1968).

that the amended location merely furthers rights acquired by a valid subsisting location, withdrawal of land subject to existing rights will not prevent the amended location. It should be emphasized, however, that the original claim must have been valid, and not voidable, in this situation. While it is true that a legal presumption arises in favor of a mineral claimant in possession and working the claim against the attempts of another claimant to enter upon the land and make a discovery, such presumption does not arise against the United States. *Brattain Contractors, Inc., supra* at 238 and cases cited. *See Houck* v. *Jose*, 72 F. Supp. 6, 10 (S.D. Cal. 1947), *aff'd*, 171 F. 2d 211 (9th Cir. 1948). By withdrawing the land, the United States has prohibited the initiation of new claims and also prevented the curing of substantive defects in other claims.[3]

Thus, we hold that to the extent that an amended location, *i.e.*, one made in furtherance of an original location, merely changes a notice of location without attempting to enlarge the rights appurtenant to the original location, such amended location relates back to the original. Examples of such amended locations would be a change in the name of the claim (*Butte Consolidated Mining Co.* v. *Barker*, 35 Mont. 327, 89 P. 302, *aff'd on rehearing*, 90 P. 177 (1907); *Seymour* v. *Fisher*, 16 Colo. 188, 27 P. 240 (1891)), the exclusion of excess acreage so long as the original discovery point is preserved (*see Waskey* v. *Hammer, supra*), and a change in the record owners of a claim where such change is reflective of an existing fact (*United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 441 (9th Cir. 1971); *Thompson* v. *Spray*, 72 Cal. 528, 14 P. 182 (1887)).

[3] Finally, we would point out that if an amended claim had been filed, the recording of such amended claim under sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or under sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information as is required by the applicable regulations, would constitute compliance with the Federal recording requirements since the two notices must be construed together.[4] *Hagerman* v. *Thompson, supra; Bergquist* v. *West Virginia-Wyoming Copper Co., supra; Giberson* v. *Tuolumne Copper Mining Co.*, 41 Mont. 396,

[3] We are aware that placer claimants have, in certain instances, been required both to obtain new land and relinquish land originally claimed in order to conform the claim to an official survey. Inasmuch as that fact situation is not presented herein, we need not determine whether, in these circumstances, the inclusion of new land operates as an exception to the general rule.

[4] We note that 36 CFR 9.5 requires that various documentation, including the date of amendments and relocations, be filed on or before Sept. 28, 1977. A letter from the Assistant to the Regional Director, Rocky Mountain Region, National Park Service, to the Utah State Director, BLM, stated: "These mining claim locations were recorded * * * in accordance with the provisions of [the Mining in the Parks Act]." We will, therefore, assume for the purposes of this decision that the appellants have otherwise complied with the recordation requirements of the Mining in the Parks Act.

109 P. 974 (1910); *Duncan* v. *Fulton*, 15 Colo. 140, 61 P. 244 (1900).

Turning to the facts of the appeal before us, we note that the State of Utah, unlike many other Western States, does not have a specific statute permitting or regulating amended locations. The Supreme Court of Utah, however, has recognized the right of locators to amend. *See Cranford* v. *Gibbs*, 123 Utah 447, 260 P. 2d 870 (1953).

The three State Office decisions involved separate groups of claims. The decision in AD 49–78 involved the Copperspur Nos. 1–42, 61–118, inclusive, situated variously in secs. 1, 11, and 12, T. 29 S., R. 16 E., Salt Lake meridian; secs. 26 and 35, T. 28 S., R. 16 E., Salt Lake meridian; sec. 31, T. 28 S., R. 17 E., Salt Lake meridian; and secs. 5, 6, and 8, T. 29 S., R. 17 E., Salt Lake meridian. The decision in AD 50–78 involved the Jean Nos. 7–26, 28–48, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81–100, 103–120, inclusive, all situated in T. 36 S., R. 8 E., Salt Lake meridian. The decision in AD 51–78 involved the RG Nos. 101–126, 131–166, and 183–200, inclusive, all located in T. 36 S., R. 7 E., Salt Lake meridian. Appellants aver that all of these were amended locations of prior existing claims; we will examine each group separately.

The Copperspur group was recorded on June 13, 1974. The location certificates[5] recited that they had been located on May 20, 1974, by R. Gail Tibbetts and one George Addison. The Copperspur Nos. 1–42, and 61–84, inclusive, overlie a group of claims known as the "Orange Claim Group." The Copperspur Nos. 85–118, inclusive, overlie a group of claims identified as the "Original 'Tibbetts' Claims."[6] The Orange Claim Group was located in May 1955, alternatively by Robert G. Park and William J. Jones. The Original "Tibbetts" Claims were located in 1951 by Fred Frazier, Harold Provonsha, and Bill Tibbetts. Bill Tibbetts was the father of the appellants. Appellants contend that all interests in these claims were verbally transferred to Bill Tibbetts, who in turn verbally transferred all of the claims, in 1969, to R. Gail Tibbetts.

The Jean group was recorded on Apr. 2, 1974. The location certificates recited that they had been located on Mar. 3, 1974, by R. Gail Tibbetts and the Minerals Recovery Co. These claims were apparently subsequently transferred to the Blue Eagle Mining Co., by a mining lease and option executed in August 1977. The Jean group overlie various claims identified as the Colt Nos. 1–27, inclusive; the Circle "M" Nos. 1, 3, 5, 9, 11–17, inclusive; the Circle "X" Nos. 1–20, inclusive; the Circle "Y" Nos. 1–20, inclusive; and the Circle "Z" Nos. 1–20, inclusive.[7] The

[5] While we will employ the term "location" notices, we do not mean to imply that these documents were not "amended location" notices. As we will explain, *infra*, we do not here decide whether these were, in fact, new location notices.

[6] Because of the multiplicity of claim names, we will use the terms "Orange Claim Group" and "Original 'Tibbetts' Claims" since they were referred to as such in appellants' submissions to the Department.

[7] Certain Jean claims overlie certain Circle "Z" claims which are not the subject of this appeal. Those Jean claims are Nos. 62, 64, 66, 68, 70, 72, 74, 76, 78, and 80.

Colt claims were located in 1966 and 1967. The various Circle claims, with the exception of the Circle "M" group, were located in 1967. R. Gail Tibbetts was co-locator of all of the claims located in 1966 and 1967. Various other parties, however, were co-locators of all of these claims as well. The Circle "M" group was apparently located by an individual named Wilcox in 1954.[8] Moreover, it appears that the Jean Nos. 7–20, inclusive, do not merely overlie prior claims; rather, they apparently encompass various parts of individual Circle "M" claims and other parts of the Circle "X" claims Nos. 1 and 2.[9] Appellants contend that, in 1969, through certain verbal mesne conveyances, R. Gail Tibbetts and Mineral Resources Co. acquired all the interests of the other locators.[10]

The RG group was recorded on Feb. 20, 1975. The location certificates recited that they had been located on Feb. 1, 1975, by Ray Tibbetts and R. Gail Tibbetts. These claims were also apparently transferred to the Blue Eagle Mining Co. by a mining lease and option executed in 1977. The RG claims overlie various claims identified as the Choprock Nos. 501–549, 574–595, and 600–607, and the Chet Nos. 1 and 2. These claims were located in 1967, by differing groups of co-locators, some of which included R. Gail Tibbetts.[11] Apparently, the Choprock Nos. 574–595 were never recorded. The RG Nos. 131–152 overlie these claims. Additionally, the Choprock No. 533 and the Chet No. 1 covered the same ground. Appellants contend that all co-locators verbally transferred their interests in these claims to them in 1969.

[4] There exist a few subsidiary issues with which we will deal prior to the examination of the main issue involved in this appeal. We noted, *supra*, that the Choprock Nos. 574–595, inclusive, were apparently never recorded. The applicable Utah statute provides:

> Within thirty days after the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county recorder of the county in which such claim is situated a substantial copy of such notice of location.

Utah Code Ann. (1953) 40–1–4.

In *Atherley* v. *Bullion Monarch Uranium Co.*, *supra*, the Utah Supreme Court held that the failure to record a notice of relocation, therein termed an "amended location," did not work a forfeiture of the claim. The court held that "title to a mining claim is * * * initiated by discovery and segregation both of which requirements were performed in this case. An estate immediately vested and the Utah law does not provide for a forfeiture for failure to record." 335 P.2d at 74. As a result of this analysis, the court ruled that a subsequent loca-

[8] We have also been unable to find any copies of the original location notices for the Circle "M" group of claims. Additionally, there is no recitation in appellants' submissions concerning how they acquired title to these claims.

[9] *See* n. 14, *infra*.

[10] *See* n. 8, *supra*.

[11] Many of the location notices show that various co-locators' names had been scratched out.

tor, *with knowledge* of the original locator's related claim, could not enter the land for the purpose of establishing a mining claim thereon. The court, however, expressly noted that this rule was not applicable vis-a-vis the United States, citing *Houck* v. *Jose*, *supra*.

In conformity with this interpretation, we hold that while the failure to record the mining claim as required by Utah State law does not, in and of itself, render the claim invalid, the withdrawal of the premises by the United States, prior to any corrective action by the claimant, would serve to nullify the claim.[12] The 1972 withdrawal thereby invalidated the Choprock Nos. 574–595, inclusive. Accordingly, the RG Nos. 131–152, inclusive, which were allegedly based on the Choprock Nos. 574–595, were null and void ab initio, since they were either located when the land was withdrawn or, if deemed to be amended locations, sought to amend claims which were already void.

[5] The next question which we must consider relates to the fact that all of the transfers to appellants were verbal. Under Utah law, the right to a mining claim is an interest in real property, which may pass by deed. *Lavagnino* v. *Uhlig*, 26 Utah 1, 71 P. 1046, 1051 (1903), *aff'd*, 198 U.S. 443 (1905). Moreover, the Utah Supreme Court has specifically held that the statute of frauds applies to an interest in a mining claim. *Woolley* v. *Wycoff*, 2 Utah 2d 329, 273 P.2d 181, 183 (1954). The Utah statute of frauds contains a provision that certain transactions which are required by the statute to be committed to writing are void if they are not. Transfer of real estate, except by an agent, is not listed therein. *See* Utah Code Ann. (1953) 25–5–4. The question, therefore, is whether the failure to commit to writing an alleged transfer of a mining claim from the original locators and co-locators necessarily nullifies an amended location. We do not believe that it does.

The statute of frauds is intended for the benefit of the parties to an unwritten agreement "being designed to enable parties to certain types of transactions to escape liabilities and duties assumed orally but not in writing." *Mustard* v. *United States*, 155 F. Supp. 325, 332 (Ct. Cl. 1957). For this reason, it has been held that strangers to the agreement cannot plead the statute. *Livingston* v. *Thornley*, 74 Utah 516, 280 P. 1042, 1045 (1929). Even when the statute provides that an agreement is void, the general rule is that it is merely voidable at the option of a party to the agreement. *See Ford Motor Co.* v. *Hotel Woodward Co.*, 271 F. 625, 627–28 (2d Cir. 1921).

In light of the above, we hold that the fact that transfers of mining claims are oral and not committed to writing does not, ispo facto, invalidate a subsequent amended location notice. Since the United States

[12] The period of time for holding property by adverse possession under Utah law is 7 years. Utah Code Ann. 78–12–5 *et seq.* (1953). Therefore, appellants could not have initiated a claim under 30 U.S.C. § 38 (1976) prior to the effective date of the withdrawal. *Cf. United States* v. *Guzman*, 18 IBLA 109, 81 I.D. 685 (1974).

is essentially a stranger to the agreement, the fact that the agreement may be subject to the statute of frauds should not be used to invalidate the claim. This rule is in conformity with another well-established rule in the mining laws that the omission of a co-locator's name in an amended notice is only subject to the objection of the co-locator whose name has been omitted.[18] *Tonopah & Salt Lake Mining Co.* v. *Tonopah Mining Co.*, *supra*; *Thompson* v. *Spray*, *supra*. We also hold, however, that the failure to commit a transfer of a mining claim to writing does give rise to a question of fact into which the Department may properly inquire.

[6] Thus, we reach the question which is essential to this appeal: were the actions variously taken in 1974 and 1975 in the nature of "amended" notices of location, or were they relocations made after the land had been withdrawn?

The decision of the State Office noted that nothing on the face of the notices for the Copperspur, Jean, and RG claims indicated that these were amended notices or even relocations. This is true. There is no absolute requirement, however, that an amended location or a relocation state that this is its purpose on its face.

The general rule is that an "amended" certificate need not state the specific purpose of the amendment. *See Tonopah & Salt Lake Mining Co.* v. *Tonopah Mining Co.*, *supra* at 397; *Johnson* v. *Young*, 18 Colo. 625, 34 P. 173 (1893); *Lindley on Mines* (1897) at § 398. We have been unable, however, to discover any court case dealing with an alleged amended certificate or location in which the documents do not, on their face, indicate that they are amended or additional location notices. We feel that while this omission does not inevitably lead to the conclusion that no amended location was intended, it does properly give rise to an inference that such was not the intent. *See The Heirs of M. K. Harris*, 42 IBLA 44 (1979).

In *United States* v. *Consolidated Mines & Smelting Co.*, *supra*, the Ninth Circuit Court of Appeals noted that the appellant:

> [C]laimed that some of its location notices were actually relocation notices. This contention was dismissed by the Department with the observation that relocation is necessarily adverse to the interests of prior locators. Thus, the Department concluded, Consolidated's rights in its mining claims must date from the "relocation" notices filed after the withdrawal. This generalization is correct only if the relocator claims against, rather than through, the prior locator. *If a relocator claims through the prior locator, ordinarily the relocation notice relates back.* * * * The evidence before the Department did not indicate whether Consolidated claimed through or against its predecessors. Thus, the Department's generalization is supported only by an unjustifiable assumption of fact. Accepting arguendo Consolidated's status as a relocator, hearings would have been desirable to ascertain the relationship between Consolidated's relocations and prior loca-

[18] We would note, however, that the exclusion of one of eight co-locators of an association placer claim for 160 acres, without the substitution of an additional co-locator, permits the Department to properly inquire into the existence of a discovery as of the time of the amendment. *See, e.g., United States* v. *Harenberg*, 9 IBLA 77 (1973).

tion made by persons through whom Consolidated claimed.

Given a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void. [Italics supplied.]

455 F. 2d 432, at 441.

We believe that this precedent is applicable herein. A number of problems have been delineated above. First, there is a question whether appellants obtained title to the mining claims prior to the 1974 locations. Second, there is a question whether the 1974 actions were intended to be amendments of the prior location, relocations, or new locations. These matters are best determined at a hearing.

We also note that appellants contend that they relied on the advice of a National Park Service employee, one Harold Ellingson, in their actions, particularly in the recordation of the claims. It is axiomatic that regardless of the validity of the 1974 locations, nothing in the decision below adversely affected the prior locations. However, since these prior locations were not recorded, they would now be void under sec. 8 of the Mining in the Parks Act, 90 Stat. 1343, 16 U.S.C. § 1907 (1976).

The circumstances in which estoppel will lie against the Government are of a very limited nature. We do not now decide whether, if it could be proved that appellants were misled as to which claims should be recorded, estoppel would lie herein. It is sufficient to note that inasmuch as we are referring the matter to the Hearings Division for the assignment of an Administrative Law Judge, the hearing should include an inquiry into this question, so that we may resolve any future question without substantial factual uncertainties. Insofar as the testimony of Ellingson would be critical to such determinations, we request that provision be made for his appearance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as regards the RG Nos. 131–152, and set aside as to all other claims, and the case files for such claims are hereby referred to the Hearings Division for the assignment of an Administrative Law Judge who will conduct a hearing inquiring into the matters set out in the text.[14] The appellants will have the burden of

[14] In addition, we noted in the text that Jean Nos. 7–20, embrace parts of various prior claims. This raises a difficult factual problem. If it was intended that the Jean location notices for those claims serve as amended notices of location, they constitute, in effect, attempts to acquire new land vis-a-vis the earlier locations. As an example, let us assume that original claims A and B, each embrace 80 acres, consisting respectively of the E½ NW¼ for claim A, and the W½ NW¼ for claim B, are amended to read the N½ NW¼ for claim A, and the S½ NW¼ for claim B. The inclusion in claim A of the NW¼ NW¼ and the inclusion in claim B of the SE¼ NW¼ entails the acquisition of new land to those two claims. Such inclusion is impermissible in the face of an intervening withdrawal of land. Thus, in our example, the NW¼ NW¼ of claim A and the SE¼ NW¼ of claim B would be null and void ab initio. Moreover, if the only point of discovery in claim A had been located in the SE¼ NW¼ the exclusion of the discovery point would also invalidate the NE¼ NW¼. *See Waskey* v. *Hammer, supra.* The record before us is inadequate to make the factual determinations necessary to determine which portions, if any, of the Jean Nos. 7–20 may be valid. We therefore request that the appellants present evidence on this point and that the Administrative Law Judge determine this question initially.

showing that the 1974 and 1975 location notices were amended locations rather than new locations or relocations. The Judge will issue an initial decision which may be appealed by any party adversely affected.

JAMES L. BURSKI.
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the majority analysis, except in two respects.

I submit that the inference to be drawn from failure to designate an alleged amended location notice as "amended" should be more limited. The inference that there was no intent to "relocate" rather than to amend should apply only (1) where the locators on the new document are not the same or successors to those on the prior document, or (2) where there has been a lapse in required assessment work. If the parties are not in privity, an adversary relationship can be presumed, at least to the extent of the differences. If assessment work is not performed, an abandonment by the locator and a "relocation" is a possibility.

While I concur that the specified BLM decision should be set aside, I would remand to BLM, rather than to the Hearings Division, for further proceedings. The contemplated hearing could prove costly, time-consuming, and possibly unnecessary. Appellants have not applied for the 261 patents and application may never be made. BLM is burdened with the implementation of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–82 (1976) and other matters. Therefore, in the interest of administrative convenience and economy, BLM should be given authority to chart its course. The Board should rule that the claims are not to be declared void ab initio without the hearing specified. Among the options available to BLM would be the following: (1) the scheduling of the withdrawal hearing; (2) recognition of the later locations as amended locations of claims prior to the withdrawal; (3) reservation of the question of validity of the later locations as amendments until a later time or until the question is precipitated as to a particular claim by an application for patent; and (4) review of the claims to determine whether any contests should be brought and to determine whether such a contest could be any less burdensome than the hearing on the withdrawal.[1]

JOSEPH W. GOSS,
Administrative Judge.

[1] While I do not mean to imply a contest would be appropriate, neither should a contest prior to a withdrawal hearing be precluded by the Board. One question concerns the 99 claims in the Copperspur group, which appellants state were located on May 20, 1974; a preliminary inquiry on this matter would seem appropriate. *See United States* v. *Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973), *sustained sub nom. Roberts* v. *Morton*, 549 F. 2d 158 (10th Cir. 1977), *cert. denied sub nom. Roberts* v. *Andrus*, 434 U.S. 834 (1977).

SQUIRE BAKER

1 IBSMA 279

Decided *October 25, 1979*

Appeal from a decision of Administrative Law Judge David Torbett dated June 1, 1979, vacating two cessation orders and one notice of violation issued by the Office of Surface Mining Reclamation and Enforcement pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket No. NX 9-25-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

Where excavation work has taken place and coal exposed, but no coal removed, and the landowner's intent is to create homesites and not to remove coal unless permission to do so is received from the state, the Office of Surface Mining Reclamation and Enforcement lacks jurisdiction over the land.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, the Office of Surface Mining Reclamation and Enforcement; John T. Aubrey, Esq., Manchester, Kentucky, for appellee, Squire Baker.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge (ALJ) David Torbett dated June 1, 1979, vacating two cessation orders and a notice of violation issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1]

On Nov. 8, 1978, two OSM inspectors visited a site located in Clay County, Kentucky. Following the inspection OSM issued Notice of Violation No. 78-II-10-9 and Cessation Order No. 78-II-10-4.[2] The permittee or operator listed on the notice and the order was Hardly Able Coal Co. OSM returned to the site in January 1979 and issued Cessation Order No. 79-II-10-1 for failure to abate the violations listed in the previous notice. Hardly Able Coal Co. was again listed as the permittee or operator. Subsequently, both orders and the notice were modified to substitute Squire Baker for Hardly Able Coal Co. as the permittee or operator. Baker sought review of the orders and the notice by filing an application for review pursuant to sec. 525(a)(1) of the Act. 30 U.S.C. § 1275(a)(1) (Supp. I 1977).

A hearing was held on Apr. 17 and on June 1, 1979, the ALJ vacated the orders and the notice. He ruled that OSM did not have juris-

[1] 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[2] The notice listed two violations—mining within 300 feet of an occupied dwelling and failure to post appropriate signs and markers. Three violations were detailed in the order—mining without a state permit, failure to pass drainage through sedimentation ponds, and mining within 100 feet of the outside right-of-way of a public road.

diction over the site. He found that despite the fact that the site had been excavated and the coal exposed, no coal had been removed and Baker did not intend to mine coal unless the state issued him an onsite construction permit.

After examining the Act, the regulations, and the record in this case, we are compelled to agree with the ALJ.

Discussion

The facts as set forth below are most important to the result reached in this case. Squire Baker owned the land in question and wanted to develop it to create homesites for his children (Tr. 70–74). He was aware that the land was underlaid with coal, and desiring to remove the coal in order to establish solid building foundations for the houses, he filed an application with the State of Kentucky seeking an onsite construction permit (Tr. 74–75; Exh. A–2). No excavation was undertaken until after Baker had applied for the permit (Tr. 105). Baker contracted with his son-in-law, who worked for Hardly Able Coal Co., to perform the excavation work on the site (Tr. 76–77). Under Baker's direction Hardly Able Coal Co. began excavating the site on Oct. 10 or 11, 1978 (Tr. 103, 104). Excavation of the site was halted when the coal seam was exposed (Tr. 103). No coal had been mined at the time the enforcement actions were taken by OSM nor had any coal been mined at the time the ALJ held the hearing in this case.

While there was testimony at the hearing to indicate that Baker's onsite construction permit application had been denied on Jan. 21, 1979, he had not removed any coal from the site and he stated that he did not intend to mine any coal until he had permission to do so (Tr. 79, 81, 99). Baker's primary intent was to create homesites. Although he had a secondary intent to remove the coal, his intent to remove coal was conditioned upon his receiving permission to do so from the state (Tr. 81).

[1] OSM argues that Baker's activities are subject to OSM's jurisdiction because those activities are encompassed by the definition of "surface coal mining operations" contained in the regulations at 30 CFR 700.5 and in virtually identical language in sec. 701(28) of the Act. 30 U.S.C. § 1291(28) (Supp. I 1977). The specific language of 30 CFR 700.5 upon which OSM relies reads as follows:

> ***Surface Coal Mining Operations*** **means: (1) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. *Such activities include excavation for the purpose of obtaining coal* * * *. [Italics added.]**

OSM contends that regardless of whether Baker's intent to remove coal was primary or secondary, the excavation work performed on his land was for the purpose of obtaining coal. We disagree. The excava-

tion work was undertaken with the expressed intention to create homesites. It was only if and when he received state permission that Baker would have removed any coal. He had not received permission at the time of the ALJ's hearing and he had not removed any coal. We therefore conclude that under these facts OSM did not have jurisdiction over his land.

OSM also states that the ALJ relied on the Board's holding in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), to exclude Baker from the jurisdiction of the Act. OSM argues that Baker is not exempt on the basis of *Patrick* because, as explained further in *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979), only publicly financed construction projects are exempt from the Kentucky coal mining regulations or the Federal initial regulations.

As stated in *Patrick* and *Moore*, during the initial regulatory program the critical factor in determining whether OSM has jurisdiction over a surface coal mining operation conducted on state land is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards. However, as set forth above, under the facts of this case Baker was not conducting surface coal mining operations and, therefore, the "subject to state regulation" inquiry is not relevant.

All motions heretofore not ruled on are denied and the ALJ's decision in this case is affirmed.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

DOCUMENTS

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